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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNIE RAY PERAZA,

Defendant and Appellant.

C046195

(Super. Ct. No.  
SF074536B)

Defendants Elisio Valdez and Johnnie Ray Peraza were convicted of various crimes, including the murders of Andrea Mestas and her fetus, the premeditated attempted murder of Ronny Gimenez, and the false imprisonment and aggravated assault of Nancy Davis. Defendant Valdez was sentenced to multiple life sentences, plus a determinate term of 11 years and 8 months in prison. Defendant Peraza received multiple life sentences, plus a determinate term of 14 years in prison. The judgments were entered on September 18, 2000.

On appeal in case Nos. C036614 and C037039, defendants raised numerous claims of error. In an opinion filed on June 25, 2003,

we rejected all but one of their contentions. We agreed with defendants that to be convicted of the implied malice murder of Mestas's fetus, they had to have reason to believe that Mestas was pregnant. Therefore, we reversed their convictions for murder of Mestas's fetus, and also reversed the multiple murder special circumstances findings, because "the court's instructions on implied malice, coupled with the prosecutor's erroneous statements of the law during argument, misled the jurors into thinking they could convict defendants on both murders while finding malice aforethought only as to Mestas's death."

The California Supreme Court granted the People's petition for review and deferred consideration of this cause pending the court's decision on the same issue in *People v. Taylor* (2004) 32 Cal.4th 863 (hereafter *Taylor*).

This court then committed clerical error by issuing a remittitur to the trial court with respect to defendant Peraza, even though the cause was still pending before the Supreme Court. In accordance with the remittitur, the trial court resentenced Peraza on February 2, 2004, and entered a new judgment consistent with our prior opinion.

The clerical error in issuing the remittitur came to this court's attention after Peraza filed this appeal, case No. C046195, from the new judgment, claiming the trial court committed sentencing error in violation of the rule enunciated in *Blakely v. Washington* (2004) 542 U.S. \_\_\_, \_\_\_ [159 L.Ed.2d 403, 413-414].

The People moved to dismiss this appeal on the ground that we lacked subject matter jurisdiction to issue the remittitur, which meant that the trial court lacked jurisdiction to modify the judgment

against Peraza and to resentence him. The People asked us to recall the remittitur and to vacate the new judgment. On October 21, 2004, we recalled the remittitur.

For reasons that follow, we now shall (1) vacate the trial court's judgment of February 2, 2004, (2) reinstate the trial court's judgment of September 18, 2000, and (3) dismiss this appeal.

#### DISCUSSION

When a remittitur is issued accidentally as the result of clerical error, the appropriate procedural mechanism is to recall the remittitur, which the appellate court may do on its own motion. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 165-166; see also *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 190-191; Cal. Rules of Court, rule 26(c)(2) [further references to "rules" are to the California Rules of Court].)

This court's order recalling the remittitur stated that the remittitur had been issued "prematurely." By this, we meant that the remittitur was premature because we lacked jurisdiction to issue it (rule 26(b))<sup>1</sup> since the California Supreme Court had not issued

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<sup>1</sup> Rule 26 states in pertinent part: "(a) A Court of Appeal must issue a remittitur after a decision in: [¶] (1) an appeal; . . . [¶] . . . [¶] (b)(1) If a Court of Appeal decision is not reviewed by the Supreme Court: [¶] (A) the Court of Appeal clerk must issue a remittitur immediately after the Supreme Court denies review, or the period for granting review expires, or the court dismisses review under rule 29.3(b); and [¶] (B) the clerk must send the lower court or tribunal the Court of Appeal remittitur and a file-stamped copy of the opinion or order. [¶] (2) After Supreme Court review of a Court of Appeal decision: [¶] (A) on receiving the Supreme Court remittitur, the Court of

a final decision and remittitur remanding the cause to this court (rule 29.6)<sup>2</sup> or had not otherwise transferred the cause to us with directions (rule 29.3(d)).<sup>3</sup>

Remittitur communicates the final judgment on appeal to a lower court, but a judgment is not final until after the time for review has expired or after the Supreme Court has issued its final determination. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 728, 731, pp. 758-759, 761.) "[T]he essence of remittitur is the returning or revesting of jurisdiction in an inferior court by a reviewing court. . . . Remittitur transfers jurisdiction back to the inferior court so that it may act upon the case again, consistent with the judgment of the reviewing court." (*Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 10, citation omitted.) "Until remittitur issues, the lower court cannot act upon the reviewing court's decision; remittitur ensures in part that only

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Appeal clerk must issue a remittitur immediately if there will be no further proceedings in the Court of Appeal; and [¶] (B) the clerk must send the lower court or tribunal the Court of Appeal remittitur, a copy of the Supreme Court remittitur, and a file-stamped copy of the Supreme Court opinion or order."

<sup>2</sup> Rule 29.6 states in pertinent part: "(a) The Supreme Court must issue a remittitur after a decision in: [¶] (1) a review of a Court of Appeal decision . . . [¶] . . . [¶] (b)(1) The clerk must issue a remittitur when a decision of the court is final. The remittitur is deemed issued when the clerk enters it in the record."

<sup>3</sup> Rule 29.3(d) provides: "After ordering review, the Supreme Court may transfer the cause to a Court of Appeal without decision but with instructions to conduct such proceedings as the Supreme Court orders."

one court has jurisdiction over the case at any one time." (*Id.* at p. 12.)

While a cause is on review before the California Supreme Court, jurisdiction is in that court; there is no concurrent jurisdiction of the Supreme Court and Court of Appeal. (2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 411, p. 1021.)

Thus, it is irrelevant when the People brought the error to our attention because until the California Supreme Court had issued its remittitur or otherwise transferred the matter back to us, we lacked jurisdiction to issue the remittitur to the trial court.

This means that the ensuing judgment, entered as a result of our misdirection, must also be set aside because the trial court also lacked jurisdiction to enter a new judgment while the cause was still pending before the California Supreme Court.

Accordingly, we shall vacate the trial court's judgment dated February 2, 2004, and reinstate the trial court's judgment entered on September 18, 2000.

Because the judgment dated February 2, 2004, must be vacated, we also must dismiss Peraza's appeal (case No. C046195) from that judgment. Consequently, we cannot address the claims of sentencing error raised by both Peraza and the People in the dismissed appeal. None of the alleged errors were raised in the original appeal from the judgment entered on September 18, 2000, and it is too late for the parties to raise them now.

#### DISPOSITION

The judgment against defendant Peraza dated February 2, 2004 (Sacramento Superior Court case No. SF074536B) is vacated, and the

judgment imposed against him on September 18, 2000, is reinstated.  
Peraza's appeal (case No. C046195) from the judgment dated February 2,  
2004, is dismissed.

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SCOTLAND, P.J.

We concur:

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DAVIS, J.

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RAYE, J.